85-397 (1)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

RONALD W. FUDGER,
Appellant-Petitioner,

against

COUNTY OF MONTGOMERY,
Appellee-Respondent.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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12 pp

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Court below correct when it determined that the plaintiff, (as a criminal defendant), could be brought to trial without an indictment or any accusatory instrument in existence?

2. Was the Court below correct when it determined that a criminal defendant so tried could be

convicted and incarcerated upon such conviction?

3. Was the Court below correct when it determined that no cognizable federal constitutional right had been deprived to the plaintiff who had been so tried, convicted, sentenced and imprisoned?

4. Were the Courts below correct when they determined that the element of policy, custom or usage had not been proven by a preponderance of the evidence, thereby triggering 42 USC 1983 liability against the defendant municipality for the actions taken by its local officers?

5. Was the incarceration of the plaintiff pursuant to an illegal conviction a deprivation of liberty without due process of law constituting a continuing constitutional tort such as would cause a new period of limitations to commence running with each day of incarceration?

6. Were the Courts below correct when they found that the plaintiff had not been subjected to a double jeopardy violation pursuant to the V Amendment?

7. Did Sections 310.60 and 310.70 of the Criminal Procedure Law of the State of New York permit the retrial, conviction, sentence and imprisonment of the plaintiff on Felony, over objection of his Attorney, without an indictment or without waiving indictment?

8. Was the dismissal of the plaintiff's Complaint proper?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the Court whose Judgment is sought to be reviewed are Ronald W. Fudger, as plaintiff, and County of Montgomery, (New York), as defendant. Said plaintiff and defendant were the original parties to the proceeding when it was commenced, and there have been no parties either added to or deleted from the proceeding from the date of its commencement.

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CITATIONS TO OPINIONS BELOW

The opinions of the United States District Court for the Northern District of New York; the United States Court of Appeals for the Second Circuit on the direct Appeal and the United States Court of Appeals for the Second Circuit on the Petition for Rehearing In Banc are not reported in the Federal Reporter Service, but are included in the Appendix to this Petition for a Writ of Certiorari.

JURISDICTION

This Petition for a Writ of Certiorari seeks to have permission granted to appeal to this Court from the final Judgments and Orders entered in the Courts below which dismissed the plaintiff's Complaint. The jurisdiction upon which this Petition is filed is made pursuant to 28 USC 1254(1), 28 USC 2106 and Rules 17, 19, 20, 21 and 23 of this Court. This proceeding seeks appellate review of various federal and state constitutional and statutory questions affecting a citizen's rights under the V and XIV Amendments and 42 USC 1983, whether the inter-

preting of two New York State statutes to allow a Felony criminal trial to proceed without an accusatory instrument/indictment was correct and whether the plaintiff's constitutional and statutory rights were in fact denied or deprived to him. In the context of 42 USC 1983, appellate review is sought for the purpose of determining on the facts presented, whether the element of policy, custom or usage was proven, whether the plaintiff, (as a criminal defendant), was subjected to a double jeopardy and due process of law violation, and whether the statute of limitations to maintain this action was complied with.

The United States Court of Appeals for the Second Circuit and the United States District Court for the Northern District of New York have decided issues in this proceeding which are in conflict with the New York Court of Appeals, (as a state court of last resort), and with the Decisions of this Court, and as a matter of judicial discretion, appellate review is sought to resolve these conflicts. This Petition is being timely filed with this Court in that sixty

days have not elapsed since there was entered a denial to the plaintiff's timely filed Petition for Rehearing In Banc in the Court below. The date of entry of the Judgment dismissing the plaintiff's Complaint in the District Court was on August 1, 1984. A Notice of Appeal to the Court of Appeals for the Second Circuit was timely taken within thirty days thereafter. The Judgment of the District Court was affirmed by Order dated and entered April 3, 1985. A Petition for Rehearing In Banc was timely filed with that Court within fourteen days thereafter. A Decision denying the Petition for Rehearing In Banc was dated and entered on May 16, 1985. This Petition for a Writ of Certiorari is being filed within sixty days of that last date.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

The V Amendment to the United States Constitution guarantees to a citizen that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand

Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The XIV Amendment to the United States Constitution guarantees a citizen that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Statutes

A civil cause of action exists for the deprivation of constitutional rights pursuant to an Act of Congress in 1871. That statute is 42 USC 1983, which states "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

State Statutes

The procedure by which a criminal trial is conducted in the State of New York is administered through the Criminal Procedure Law. Article 310 of that law discusses in part what procedure is to be followed when a partial verdict is rendered and the jury is discharged. Section 310.60 of the Criminal Procedure Law states as follows:

1. A deliberating jury may be discharged by the court without having rendered a verdict only when:

(a) The jury has deliberated for an extensive period of time without agreeing upon a verdict with respect to any of the charges submitted and the court is satisfied that any such agreement is unlikely within a reasonable time; or

(b) The court, the defendant and the people all consent to such discharge; or

(c) A mistrial is declared pursuant to Section 280.10.

2. When the jury is so discharged, the defendant or defendants may be retried upon the indictment. Upon such retrial, the indictment is deemed to contain all the counts which it contained at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial.

Section 310.70 of the Criminal Procedure Law states as follows:

1. If a deliberating jury declares it has reached a verdict with respect to one or more but not all

of the offenses submitted to it, or with respect to one or more but not all of the defendants, the court must proceed as follows:

(a) If the possibility of ultimate agreement with respect to the other submitted offenses or defendants is so small and the circumstances are such that if they were the only matters under consideration the court would be authorized to discharge the jury pursuant to paragraph (a) of subdivision one of Section 310.60, the court must terminate the deliberation and order the jury to render a partial verdict with respect to those offenses and defendants upon which or with respect to whom it has reached a verdict;

(b) If the court is satisfied that there is a reasonable possibility of ultimate agreement upon any of the unresolved offenses with respect to any defendant, it may either:

(i) Order the jury to render its verdict with respect to those offenses and defendants upon which or with respect to whom it has reached agreement and resume its deliberations upon the entire case.

(ii) Refuse to accept a partial verdict at the time and order the jury to resume its deliberations upon the entire case.

2. Following the rendition of a partial verdict pursuant to subdivision one, a defendant may be retried for any submitted offense upon which the jury was unable to agree unless:

(a) A verdict of conviction thereon would have been inconsistent with a verdict, of either conviction or acquittal, actually rendered with respect to some other offense, or

(b) The submitted offense which was the subject of the disagreement, and some other submitted offense of higher or equal grade which was the subject of a verdict of conviction, were so related that consecutive sentences thereon could not have been imposed upon a defendant convicted of both such offenses.

3. As used in this section, a "submitted offense" means any offense submitted by the court to the jury, whether it be one which was expressly

charged in a count of the indictment or a lesser included offense thereof submitted pursuant to Section 300.50.

The Civil Practice Laws and Rules of the State of New York govern various procedures to be followed in civil litigation. Article 2 of said law deals with statutes of limitation governing various causes of action. Section 214(2) of the Civil Practice Laws and Rules states: The following actions must be commenced within three years: 2. an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in Sections 213 and 215;....

The substantive criminal law in the State of New York is embodied in the Penal Law. Article 150 of that law is entitled Arson. Two offenses which are set forth in that article are Arson in the Fourth Degree and Arson in the Third Degree. Section 150.05 of the Penal Law is entitled Arson in the Fourth Degree. Arson in the Fourth Degree is committed as follows:

1. A person is guilty of Arson in the Fourth Degree when he recklessly damages a building or a motor vehicle by intentionally starting a fire or causing an explosion.

2. In any prosecution under this section, it is an affirmative defense that no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle.

Arson in the Fourth Degree is a class E felony.

Section 150.10 of the Penal Law defines Arson in the Third Degree. Arson in the Third Degree is defined as follows:

1. A person is guilty of Arson in the Third Degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion.

2. In any prosecution under this section, it is an affirmative defense that (a) no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle, or if other persons had such interests, all of them

consented to the defendant's conduct, and (b) the defendant's sole intent was to destroy or damage the building or motor vehicle for a lawful and proper purpose, and (c) the defendant had no reasonable ground to believe that his conduct might endanger the life or safety of another person or damage another building or motor vehicle.

Arson in the Third Degree is a class C felony.

The Public Officers Law in the State of New York defines both a state officer and a local officer and their respective position in either an elected or appointed capacity. Section 2 of the Public Officers Law of the State of New York states as follows: The term "state officer" includes every officer for whom all the electors of the state are entitled to vote, members of the legislature, justices of the supreme court, regents of the university, and every officer, appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation to any political subdivision of the

state, except United States senators, members of congress, and electors for president and vice-president of the United States. The term "local officer" includes every other officer who is elected by the electors of a portion only of the state, every officer of a political subdivision or municipal corporation of the state, and every officer limited in the execution of his official functions to a portion only of the state. The office of a state officer is a state office. The office of a local officer is a local office.

The elected positions of the County Judge of Montgomery County and the District Attorney of Montgomery County are, pursuant to said law, positions classified as a local officer of the municipal defendant, County of Montgomery

STATEMENT OF THE CASE

This action is one brought by the plaintiff, alleging a civil cause of action against the defendant, County of Montgomery, for a deprivation of constitutional rights guaranteed to him by the United

States and New York State Constitutions, the decisional law made by the Courts of the United States and New York State, and various New York State statutes, by which he was brought to trial, over objection of his Attorney, on a felony grade crime, without an indictment and without waiving indictment, and by which he was convicted, sentenced and imprisoned for a period of time stated by the Court below to total to thirty-two months. The conviction involved was for the felony grade crime of Arson in the Fourth Degree, which was thereafter reversed in January, 1980, by an intermediate Appellate Court, it being the New York Supreme Court, Appellate Division, Third Department. Said reversal of the Judgment of Conviction was premised upon the fact that the trial proceeded forward without any written accusatory instrument or indictment upon which the prosecution could be based.

The occurrences upon which the Complaint were based were alleged to exist by reason of the participation and acts taken by the two highest ranking

legal officers in the municipal defendant's governmental hierarchy, said officials being the County Judge of Montgomery County and the District Attorney of Montgomery County. As the result of the acts taken by those local officers pursuant to statute and their own actions, the main issue presented is whether the retrial, conviction, sentence and imprisonment of the plaintiff for a felony under color of law, accomplished without indictment or without waiving indictment, in violation of the United States and New York State Constitutions, New York State statutes, and United States and New York State decisional law, constituted a violation of the plaintiff's civil rights within the definition of 42 USC 1983.

On September 17, 1975, the Montgomery County Grand Jury indicted the plaintiff for the crime of Arson in the Third Degree, in violation of Section 150.10 of the Penal Law of the State of New York. The plaintiff was arraigned on that charge on September 23, 1975, and an application for release

on bail by the plaintiff's Attorney was denied. Thereafter, the plaintiff remained in custody for a period of 98 days, during which time he retained his own private Attorney, who made a second application for bail. That bail application was granted, but with the unusual or extremely harsh condition that the plaintiff not leave his home. The plaintiff was alleged to have violated that condition and bail was revoked. Thereafter, the plaintiff remained incarcerated for an additional 60 days, until the trial commenced. When the case was submitted to the jury, there was charged, as a lesser included offense, the crime of Arson in the Fourth Degree, in violation of Section 150.05 of the Penal Law, which was designated as a class E felony and carried a maximum punishment of two to four years imprisonment. The distinction between the two crimes is limited to intentional versus reckless conduct, or an element of mental culpability. After about eight hours of deliberations, the jury acquitted the plaintiff of the crime of Arson in the

Third Degree, but advised the Court that they were hopelessly deadlocked on the crime of Arson in the Fourth Degree. The acquittal of the plaintiff on the sole count contained in the indictment dismissed that accusatory instrument pursuant to then existing decisional law from the New York Court of Appeals. The local officer for the defendant municipality then declared a mistrial and directed that the charge of Arson in the Fourth Degree remain on the trial calendar until the next term of court. The plaintiff was again released on bail, subject to the same restrictive conditions that he remain in or not leave his home. Again, the plaintiff was alleged to have violated that condition and bail was again revoked.

At the March, 1976 trial term, the District Attorney for Montgomery County, in the presence of the jury panel, announced that he had reached a decision to proceed no further with the prosecution of the plaintiff, since the People were unable to prove his guilt beyond a reasonable doubt. The court, through

its County Judge, who was then the highest ranking legal officer of the municipal defendant, issued a Decision which required the prosecution to continue. This directive was made notwithstanding the fact that there was no written indictment in existence accusing the plaintiff of the crime of Arson in the Fourth Degree as was returned by a Grand Jury or some other judicially created body.

In the meantime, the District Attorney had obtained a new and different indictment against the plaintiff, accusing him of Criminial Possession of Weapons and Stolen Property. After a jury trial in November, 1976, he was found guilty of that offense and sentenced to a maximum term allowed by law, of two to four years in state prison. That trial, conviction and sentence was again presided over by the Montgomery County Court Judge and was prosecuted by the District Attorney of Montgomery County. While the plaintiff was incarcerated on that conviction, his Attorney was then suspended from the practice of law, and an Appeal was taken

from that conviction but was never perfected, with the result being that the plaintiff served the entire sentence which had been imposed. By law, the plaintiff would have been eligible for parole after serving the minimum two-year period of the sentence, but parole release was denied, in whole or in part as the result of the pending charge and later conviction for the crime of Arson in the Fourth Degree, and by reason of a letter written by the Montgomery County Judge to the Parole Board which stated, "This defendant has been convicted of five separate and distinct felonies during the past eight years, and the feeling of the community is strongly against parole at this time."

During his incarceration, the plaintiff made a Motion seeking to dismiss the pending charge of Arson in the Fourth Degree on speedy trial time limitation grounds, but when that Motion was made, he was immediately transported back from state prison to the County Court of Montgomery County for the purpose of a hearing on the Motion and, if denied, to commence trial on the charge of Arson

in the Fourth Degree. That transfer of the plaintiff from custody was effected by Order of the County Judge of Montgomery County. The speedy trial time limitation Motion was denied, and the plaintiff was advised that his trial would commence in a matter of days. The plaintiff was again assigned counsel and also given the opportunity to retain private counsel. The plaintiff retained private counsel who was paid a retainer of $3,500.00 dollars for that legal representation. A short adjournment was afforded to said Attorney, and, at the time the trial was scheduled to commence, that Attorney made a Motion to dismiss the prosecution due to the absence of any written indictment accusing the plaintiff of a Felony, specifically the charge sought to be brought to trial, Arson in the Fourth Degree. That Motion was denied by the County Judge of Montgomery County, and the trial commenced. The trial resulted in a verdict of guilty, and the defendant was sentenced to an additional two-to-four year term in state prison, to be served

consecutively. While a Notice of Appeal was filed from that conviction, it was not until January 31, 1980, that the issues on the Appeal were ruled upon by an intermediate Appellate Court which reviews criminal convictions in the State of New York. That Court held that the conviction was required to be reversed because of the absence of any indictment charging the plaintiff with the crime of Arson in the Fourth Degree. As its authority for that ruling, two previous Decisions of the New York Court of Appeals were relied upon, and a review of those Decisions will show clearly that the underlying basis upon which the same were made was that the V & XIV Amendments to the United States Constitution mandate the existence of an accusatory instrument for a criminal prosecution to proceed. Further, the New York Court of Appeals ruled in those cases that the principal of double jeopardy would prohibit a prosecution if an accusatory instrument did not exist or had been previously dismissed. At the time of the reversal of the

conviction for Arson in the Fourth Degree, the plaintiff served a period of twenty (20) continuous months of incarceration on that conviction, and in this action, he sought monetary compensation from the defendant municipality for the actions of its local officers who had transgressed upon his constitutional rights.

The plaintiff was required to serve his entire sentence until such time as he had reached a mandatory release date. Any consideration of the Parole Board in authorizing an early release was denied on a number of occasions. In one of those administrative hearings seeking parole, the municipal defendant's local officer, the County Judge of Montgomery County, contributed input stating that it was "The feeling of the community" that parole should not be granted.

At the trial in the Courts below, the plaintiff submitted testimony as to all input leading to the denial of parole, coupled with many decisions requiring the prosecution to continue, the actual

sentence imposed, the denial of a release based upon a plea bargaining agreement, the denial of pre-trial jail credit time, etc., all issued by the highest ranking legal officer of the defendant municipality, and asked the Trial Court to find that those actions as taken satisfied the element of policy, custom or usage in an action prosecuted under 42 USC 1983. The Trial Court refused to accept that evidence as policy, custom or usage.

The plaintiff served completely an illegal and unauthorized sentence of imprisonment totalling to thirty-two (32) months, expended $3,500.00 dollars for his defense in the second Arson trial, had his marriage dissolved because of the imprisonment imposed, and was subjected to a number of violations of rights guaranteed by the United States Constitution, all of the same occurring at the hands of the defendant municipality and its local officers. Those actions clearly entitled the plaintiff to a monetary recovery in an action brought pursuant to 42 USC 1983.

This proceeding involves a review of the Judgment

of a Federal Court as affirmed on Appeal. The basis for federal jurisdiction is that the plaintiff's cause of action arises under a federal statute. Jurisdiction for the Federal Courts to hear this action is authorized pursuant to 28 USC 1343, which grants to District Courts original jurisdiction of any civil actions authorized to be commenced by any person because of the deprivation of any right or privilege of a citizen of the United States. Jurisdiction for this proceeding to be reviewed by this Court by a Petition for a Writ of Certiorari is authorized pursuant to 28 USC 1254(1) & 28 USC 2106.

ARGUMENT

POINT #1

THE COURT BELOW WAS IN ERROR WHEN IT DETERMINED THAT NO COGNIZABLE FEDERAL CONSTITUTIONAL RIGHT HAD BEEN DEPRIVED TO THE PLAINTIFF WHO HAD BEEN TRIED, CONVICTED, SENTENCED AND IMPRISONED WITHOUT AN INDICTMENT OR ANY ACCUSATORY INSTRUMENT BEING IN EXISTENCE.

In affirming the Decision of the District Court the Panel of the United States Court of Appeals for the Second Circuit stated that it was doing so "substantially" for the reasons stated by the District Judge. The Panel also noted "in passing" that the "requirement of an indictment has never been made applicable to the states". It therefore appears difficult to determine precisely what was the basis for the affirmance in the Court below. Was it based principally upon the supposed absence of the impairment of a federal constitutional right; or was it based upon that plus the conclusions of law made by the District Court?

In support of its position that there did not exist the impairment of a federal constitutional right,

the Court below cited Wojtycha v. Hopkins, 517 F2d 420. Wojtycha in turn cites and relies upon Hurtado v. California, 110 U.S. 516. A reading of both those Decisions renders two things abundantly clear. The first is that both Courts are talking about presentment by a Grand Jury; and neither case dispenses with the necessity for an accusatory instrument of some kind in order to meet due process and double jeopardy requirements.

The law determining what is a guaranteed federal constitutional right has changed over the years, one example being when the holding in Palko v. Connecticut, 302 U.S. 319 was overruled in Benton v. Maryland, 395 U.S. 784. In Benton it was held that this Court had "increasingly looked to the specific guarantees of the Bill of Rights to determine whether a state's criminal trial was conducted with due process of law".

The point sought to be made is that the principle enunciated in Hurtado and repeated and followed in Wojtycha represents the last remaining element of Fifth Amendment guarantees, which continues to be

considered inapplicable to the states by virtue of the Fourteenth Amendment. Because of the legal arguments raised in this proceeding, it is submitted that the position which this Court took in Hurtado more than 100 years ago should be altered. It is contended in this Petition that the applicability of Hurtado and Wojtycha does not impair the right of the plaintiff to recover on his cause of action. It is urged in this Petition that the holdings in Hurtado and Wojtycha were misapplied.

The plaintiff in this case was tried not only without an indictment by a Grand Jury, he was tried without any accusatory instrument whatsoever on a charge which had previously been submitted to a trial jury as a lesser includible offense under a subsequently dismissed single count indictment. This simple fact gave rise to several federal constitutional infirmities. The first of these is that without an accusatory instrument, the plaintiff, (as a criminal defendant), had no notice of the charges against him, and such notice has been

repeatedly held to be a constitutional necessity, the denial of which constitutes a deprivation of due process of law. Cole v. Arkansas, 333 U.S. 196; In Re Oliver, 333 U.S. 257 and Watson v. Jago, 558 F2d 330. Whatever may be the requirements of the Fifth and Fourteenth Amendments to the United States Constitution, as interpreted by Hurtado and Wojtycha, the Constitution and laws of the State of New York require that crimes must be prosecuted upon an indictment or other accusatory instruments. The failure to grant to the plaintiff that procedural and substantive due process which the Constitution and statutes of the State of New York say he was entitled to have constitutes a classic deprivation of due process of law.

> "The states' obligations under the Fourteenth Amendment are not simply generalized ones; rather, the state owes to each individual that process which, in light of the values of a free society, can be characterized as due."
>
> BODDIE v. CONNECTICUT
> 401 U.S. 371

Second, the plaintiff was twice placed in jeopardy for the same crime. He was tried upon an indictment containing a single count of Arson in the Third Degree. At the conclusion of the trial, the jury was instructed that it could alternatively bring back a verdict of Arson in the Fourth Degree, and such lesser includible charge was submitted to them for their decision. The jury found the plaintiff to be not guilty of the charge of Arson in the Third Degree and acquitted him of that charge. They were unable to reach a verdict as to the lesser includible offense of Arson in the Fourth Degree, and were discharged without having reached a verdict. When the plaintiff was subsequently retried for Arson in the Fourth Degree without having been reindicted, that second trial constituted a double jeopardy in violation of federal constitutional rights. The jury had acquitted the plaintiff of the only count contained in the indictment against him and, at the same time, had failed to find him guilty of the lesser includible offense which had been

submitted to them. At that moment, the indictment in question ceased to exist as an appropriate vehicle for the prosecution of criminal charges. It so ceased to exist because any subsequent attempt to use it as such a vehicle for prosecution of any one or more of the same charges which it had presented previously would necessarily constitute a placement of the plaintiff in jeopardy a second time for the same offense. In point of fact, the Court of Appeals of the State of New York, on precisely the same factual pattern, has so held.

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Poulos was again examined by the New York Court of Appeals in People v. Mayo, 48 NY2d 245, and in that Decision, the Decision of this Court in Price v. Georgia, 398 U.S. 323 was examined and interpreted. The Decisions of the District Court and the United States Court of Appeals for the Second Circuit contradict this Court's holding in Price and the holdings of the New York Court of Appeals in Poulos and Mayo.

Third, this case presents an equal protection of the law violation. All other citizens in the State of New York get tried in accordance with the Constitution and the Criminal Procedure Law. In this case, the plaintiff was not treated in that manner, was deprived of an accusatory instrument, was subjected to double jeopardy and, thereafter, was required to serve an entirely illegal sentence. In not treating the plaintiff in the same manner as all other citizens, an equal protection violation is present. Davis v. Passman, 442 U.S. 228; Flores v. Pierce, 617 F2d 1386 and LeClair v. Saunders, 627 F2d 606.

In summary, it is of little use or purpose, in this case, to say that pursuant to Hurtado and Wojtycha, the plaintiff was not entitled to indictment by a Grand Jury as a matter of federal right. Unarguably, he had federal constitutional guarantees of due process of law, of equal protection of the law, and of freedom from being twice placed in jeopardy for the same offense. Collateral to the failure to give to him an accusatory instrument upon which to

be tried, he was denied the protection of all of those federal constitutional guarantees.

It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be granted, the Judgments entered in the Court below vacated, Judgment be granted in favor of the plaintiff, and that this proceeding be remanded to the Court below for the purpose of determining the amount of the damages to be awarded to the plaintiff.

POINT #2

THE INCARCERATION OF THE PLAINTIFF PURSUANT TO AN ILLEGAL CONVICTION WAS A DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS OF LAW WHICH CONSTITUTED A CONTINUING CONSTITUTIONAL TORT SUCH AS WOULD CAUSE A NEW PERIOD OF LIMITATIONS TO COMMENCE RUNNING WITH EACH NEW DAY OF INCARCERATION.

Each of the Courts below determined that the plaintiff had not commenced this action within the applicable three-year statute of limitations. The District Court used as the beginning point for the running of the statute of limitations the time of the illegal trial. This was an inappropriate time to commence the running of the statute of limitations for a number of reasons. The most cogent of these reasons is that it is the position of the plaintiff that he was deprived of his liberty without due process of law. That deprivation was a continuing one which the District Court found to have lasted more than thirty-two (32) months, commencing long after the termination of the illegal trial. The earliest point in time at which the plaintiff could conceivably have commenced to serve the sentence

resulting from the illegal trial was on November 21, 1979. It cannot be rationally argued that the statute of limitations on a constitutional tort for the deprivation of liberty could conceivably have commenced to run before the plaintiff was ever deprived of his liberty. Furthermore, the tort was a continuing one which was repeated daily for a period of thirty-two months following November 21, 1979 and, with each daily repetition, a new statute of limitations commenced to run. Korry v. Intern. Tel & Tel. Corp., 444 F. Supp. 193 at 196; 509 Sixth Avenue Corp. v. New York City Transit Authority, 15 NY2d 48 and Lorenzo DeMedici v. Lorenzo DeMedici Inc., 101 AD2d 719.

The inquiry presented therefor is whether the plaintiff's action, commenced within three years of a final determination by an Appellate Court that his trial, sentence and imprisonment were illegally accomplished, was timely commenced within the applicable decisional law of the Federal Courts in a 42 USC 1983 action. The issue of a statute of limitations defense

has uniformly been held that federal law determines when the claim accrues. For the purpose of the statute, the commencement of the statute occurs when the plaintiff "knows or has reason to know" of the injury that is the basis of his action. Pauk v. Board of Trustees of City University of N.Y., 654 F2d 856, (2nd Circuit).

In Singleton v. City of New York, 632 F2d 185, it was held that where no single act is sufficiently decisive to enable a person to realize that he has suffered a compensable injury, the cause of action may not accrue until the wrong becomes apparent. The facts involved in this Appeal show that the first period of time when the constitutional deprivation became known to the plaintiff was on January 31, 1980, when the intermediate Appellate Court reviewing the criminal conviction reversed the same, stating that the conviction was constitutionally infirm. Up to that point in time, the plaintiff remained incarcerated upon the Judgment of Conviction. By any standard of logic, until some authority so advised

the plaintiff of the constitutional deprivation, the statute of limitations did not accrue. When the illegal and unconstitutional imprisonment could first be vitiated upon competent legal authority was the point at which the statute of limitations commenced. To construe the statute of limitations to commence at any earlier period of time is an erroneous decision.

It is respectfully submitted that the Petition for Writ of Certiorari should be granted to determine whether this action was timely commenced.

POINT #3

THE COURT BELOW WAS IN ERROR WHEN IT DETERMINED THAT THE ELEMENT OF POLICY, CUSTOM OR USAGE HAD NOT BEEN PROVEN BY A PREPONDERANCE OF THE EVIDENCE, THEREBY TRIGGERING 42 USC 1983 LIABILITY AGAINST THE DEFENDANT MUNICIPALITY FOR THE ACTIONS TAKEN BY ITS LOCAL OFFICERS.

The courts below appear to have equated policy, custom or usage with the requirement that the plaintiff could recover only if the County of Montgomery had previously brought to trial another defendant, likewise tried on a felony, without an indictment. This interpretation of the law is faulty in proving policy, custom or usage. Policy can be established from a single decision of a municipal official having final authority over significan matters involving the exercise of discretion. When this occurs, such a decision becomes policy, because official policy can be determined by the acts and decisions of the highest ranking official for a municipal body.

The individuals who acted on behalf of the defendant municipality were the County Judge and District Attorney of Montgomery County, each of said individuals elected by

the populace of the County of Montgomery. Each of said individuals was defined as a local officer of the defendant municipality, pursuant to Section 2 of the Public Officers Law of the State of New York, which fact was admitted by the defendant in its Answer to the plaintiff's Complaint. The County Judge was, at the time of the occurrences in question, the highest ranking legal officer in the County of Montgomery and had considerable power with respect to said elected position. The District Attorney was likewise an individual with considerable power and discretion in the performance of his official duties. Each of these public officers, acting in his respective position, exercised the power and authority which he possessed without any restraints, except that it was subject to review by an Appellate Court. The commission of any unconstitutional action taken could potentially subject its victim to incarceration, to the denial of due process of law, to the denial of an equal protection of the laws, to the attendant expense of defending himself from accusations of criminal

conduct, etc.

As early as March, 1976, the District Attorney sought to discontinue the reprosecution of the plaintiff, but he was directed or ordered to continue the prosecution by the County Judge. Thereafter, on many separate occasions, the County Judge had the opportunity to ensure and safeguard the defendant's constitutional rights, but the contrary result ensued. These abuses of power directed toward the plaintiff did not occur once or twice, but continued from 1976 until the plaintiff was required to be released from custody pursuant to law, and only after serving the full period of imprisonment.

These acts first occurred with a denial of any bail and later resulted in his being subjected to a condition of bail which, in effect, was no bail at all, ie., when he was instructed to remain confined to his home. Even after the plaintiff was acquitted of the charge of Arson in the Third Degree, bail upon the same terms was again ordered. From

that point forward, the actions of the County Judge made pursuant to his badge of authority became more pronounced. When the prosecutor sought to discontinue the prosecution, he was prohibited from doing so. When a speedy trial motion was made pro se by the plaintiff, he was immediately returned to the County of Montgomery and told that he would have to stand trial on very limited notice. When the speedy trial dismissal motion was made, it was denied. When the discretionary sentencing factor was exercised on the conviction for Arson in the Fourth Degree, the defendant was handed the maximum sentence allowed by law, with the commitment for continued incarceration being issued. When the plaintiff, (as a criminal defendant), sought an enforcement of the plea bargaining agreement, this request was denied. Thereafter, the County Judge took it upon himself to oppose the plaintiff's application for parole by representing in writing to the Parole Board that it was the "feeling of the community" that the plaintiff be denied any

release from incarceration. Parole was ultimately denied on the basis of the letter written by the County Judge and relying, in part, on the unconstitutional conviction for Arson in the Fourth Degree.

The plaintiff contends that the elements of policy, custom or usage were sufficiently proven at trial. Reliance upon the cases of Monell v. New York City Department of Social Services, 436 U.S. 658; Sala v. County of Suffolk, 446 U.S. 903, (vacated and remanded); Kingsville Indep. School Dist. v. Cooper, 611 F2d 1109, (5th Circuit); Hoopes v. City of Chester, 473 F. Supp., 1214; Quinn v. Syracuse Model Neighborhood Corp., 613 F2d 438, (2nd Circuit) and Rookard v. Health and Hospitals Corp., 710 F2d 41, (2nd Circuit) supports such a contention. In those cases, it was held that where the action which is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that municipality's

officers, liability can be sustained.

> "We conclude, therefore, that a local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983." "...municipalities can assert no reliance claim which can support absolute immunity."

When authority to make decisions for a municipality is delegated to an administrator, if such delegation results in an unconstitutional decision, the municipality is liable as long as the individual acted within the area of delegated policymaking authority.

In Rookard, the Court held the dismissal of a civil rights action was improper, and it was remanded for further proceedings upon this issue or necessary element in a 1983 action. The course of those proceedings was similar to the proceedings involved in the Court below and presented in this appeal, for when the plaintiff's proof was concluded, the defendant municipality rested and presented no evidence. In

addressing this issue, that Court held

> "Where an official has final authority over significant matters involving the exercise of discretion, the choices he makes represent government policy.... An official has final authority if his decisions, at the time they were made, for practical or legal reasons constitute the municipality's final decisions.... An allegation of policymaking authority thus requires proof of the official's scope of employment and his role within the municipal or corporate organization.... An official's title, though not dispositive of his authority to make policy....is relevant for the inferences fairly to be drawn therefrom."

It was thereafter held that the executive director of the hospital and the director of nursing were in a sufficiently high enough position of supervision and control and possessed with the authority which triggered 1983 liability.

The most convincing evidence of satisfying this element is the letter written by the County Judge to the Parole Board which is embodied in its recommendations in ultimately denying parole, to the plaintiff. In that letter, the Judge states that "the feeling of the community is strongly against parole at this time". Because no testimony

was offered by the defendant, an inquiry through cross-examination as to what investigation or survey the Judge took to support this statement is unknown. If the populace of Montgomery County did, in fact, contribute to such a statement, surely, the same constituted policy. If no input was obtained, then such a statement was nothing more than a continuation of the wish or desire of the municipal defendant's local officer to keep the plaintiff incarcerated and it readily explains everything which had occurred in the prior court proceedings.

As a general rule of law, when a party to litigation voluntarily elects not to testify or produce evidence contradicting the other party's evidence, or supporting his own position, the strongest inferences may be drawn against that party which the evidence in the record permits. Jarrett v. Madifari, 67 AD2d 396 at 407, 4th Dept., (1979) and Osowicki v. Engert, 85 AD 2d 778, 3rd Dept., (1981). The failure to contradict or present any evidence explaining the basis upon

which the statement was made to the Parole Board, as well as every act which preceded that event, permits any adverse inferences which may be drawn against the municipal defendant therefrom. One such inference is the municipal involvement of the defendant's local officers constituting a policy, custom or usage which will trigger liability in the context of a 42 USC 1983 action.

It is submitted that the holdings of the Courts below that policy had not been sufficiently proven are in error, and this Petition for a Writ of Certiorari should be granted to reverse said Conclusions of Law.

CONCLUSION

THE PETITION REQUESTING A WRIT OF CERTIORARI SHOULD BE GRANTED; THE ORDER AND JUDGMENT OF THE DISTRICT COURT AS WAS AFFIRMED ON APPEAL, DISMISSING THE PLAINTIFF'S COMPLAINT, VACATED; JUDGMENT ON THE ISSUES OF LIABILITY AWARDED TO THE PLAINTIFF; AND THE PROCEEDING REMANDED TO THE COURTS BELOW FOR THE PURPOSE OF COMPUTING AND FIXING A MONETARY AWARD FOR THE DAMAGES SUSTAINED DUE TO THE COMMISSION OF THE CONSTITUTIONAL TORTS BY THE DEFENDANT.

Dated: August 6, 1985.

Respectfully submitted,

ROBERT J. KRZYS
Attorney for Appellant-Petitioner
108 Division Street
Amsterdam, New York 12010
Telephone (518) 842-3795

APPENDIX

Order Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 16th day of May, One Thousand Nine Hundred and Eighty-five.

RONALD W. FUDGER,

Plaintiff-Appellant,

v. No. 84-7747

COUNTY OF MONTGOMERY,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Ronald W. Fudger,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

Decision and Order Affirming Judgment
of District Court

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of April, One Thousand Nine Hundred and Eighty-five.

Present:

HONORABLE WILFRED FEINBERG,
Chief Judge,

HONORABLE ELLSWORTH A. VAN GRAAFEILAND,

HONORABLE JON O. NEWMAN,
Circuit Judges.

RONALD W. FUDGER,
Plaintiff-Appellant,

- against - 84-7747

COUNTY OF MONTGOMERY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of the district court is AFFIRMED substantially for the reasons stated in the Transcript of Decision of Judge Roger J. Miner delivered in open court on July 31, 1984. In passing, we note that to the extent appellant's constitutional claim is based on an alleged violation of the Fifth Amendment's requirement of "a presentment or indictment," it fails for the reason that the requirement of indictment has never been made applicable to the states. See, e.g., United States ex rel. Wojtycha v. Hopkins, 517 F2d 420, 425 (3d Cir. 1975). We have considered all of appellant's remaining claims and find them likewise without merit.

/s/ Wilfred Feinberg
Wilfred Feinberg, Chief Judge

/s/ Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland,

/s/ Jon O. Newman
Jon O. Newman, Circuit Judges.

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Judgment of District Court

UNITED STATES DISTRICT COURT
Northern District of New York

RONALD W. FUDGER

v. 83-CV-43

COUNTY OF MONTGOMERY

HONORABLE ROGER J. MINER, District Judge

Decision by the Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Judgment be entered in favor of the defendant COUNTY OF MONTGOMERY and against the Plaintiff, RONALD W. FUDGER dismissing all claims.

Clerk: Joseph R. Scully

By: Deputy Clerk /s/
Virginia Lee Lamphere 8-1-84

Decision, Findings of Fact and Conclusions of Law of District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RONALD W. FUDGER,

Plaintiff,

versus 83-CV-43

COUNTY OF MONTGOMERY,

Defendant.

TRANSCRIPT OF DECISION of

Honorable Roger J. Miner, United States District Judge for the Northern District of New York, in the above entitled case on the 31st day of July, 1984 at the United States Courthouse, Albany, New York.

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Decision, Findings of Fact and Conclusions of Law
of District Court

APPEARANCES:

RICHARD A. INSOGNA, ESQ.
Attorney for Plaintiff

WILLIAM E. MOORE, ESQ.
Montgomery County Attorney,
For Defendant

Decision, Findings of Fact and Conclusions of Law of District Court

THE COURT: After considering the testimony of the sole witness who testified in this case, plaintiff, Ronald W. Fudger, after examining the exhibits received in evidence from both sides, after considering the stipulations of counsel and their arguments, I make the following findings of fact and conclusions of law in accordance with the provisions of Federal Rule of Civil Procedure 52(a):

FINDINGS OF FACT

1. The plaintiff is a citizen of the United States and the State of New York, resides in the County of Montgomery, and is a resident of the Northern District of New York.

2. The defendant is a municipal corporation organized and existing under the laws of the State of New York, and is a resident of the Northern District of New York.

3. That the cause of action contained in the Complaint of the plaintiff arises under Title 42 of

the United States Code, Section 1983, and this Court has original jurisdiction of this action under Title 28 of the United States Code, Section 1343.

4. That the defendant, County of Montgomery, is a "person" as defined by 42 USC, Section 1983, and the Decision of the United States Supreme Court in MONELL v. NEW YORK CITY DEPARMENT OF SOCIAL SERVICES, 436 US 658, (1978).

5. That on the 17th day of September, 1975, the plaintiff was indicted on a charge of Arson in the Third Degree, in violation of Section 150.10 of the Penal Law of the State of New York.

6. That during December, 1975, the plaintiff was tried on the Indictment filed against him, and during the course of said trial, the lesser included offense of Arson in the Fourth Degree, in violation of Section 150.05 of the Penal Law of the State of New York, was also submitted to the jury for a determination of the plaintiff's guilt or innocence in respect

thereto.

7. That by a jury verdict on January 6, 1976, the plaintiff was acquitted of the crime of Arson in the Third Degree, which thereby dismissed the Indictment previously returned against him on September 17, 1975.

8. That by the same jury verdict of January 6, 1976, the jury was declared to be hopelessly deadlocked and a mistrial was declared as to the lesser included offense of Arson in the Fourth Degree.

9. That the crime of Arson in the Fourth Degree is classified as a Class E Felony by the Penal Law of the State of New York.

10. That the plaintiff, without any Indictment or Superior Court information in existence, thereafter was re-tried for the crime of Arson in the Fourth Degree.

11. That prior to the commencement of the re-trial, the Montgomery County District Attorney attempted to discontinue or terminate the continued prosecution

of the plaintiff for the crime of Arson in the Fourth Degree, but he was directed to proceed with said re-trial by the Montgomery County Judge.

12. That the re-trial of the plaintiff for the crime of Arson in the Fourth Degree resulted in a jury returning a verdict convicting the plaintiff of said crime. The plaintiff was thereafter sentenced to an indeterminate term of incarceration of two to four years, his custody being transferred to the New York State Department of Correctional Services pursuant to a commitment which was issued by the Montgomery County Judge.

13. That the plaintiff appealed said Judgment of Conviction to the New York Supreme Court, Appellate Division, Third Deparment, and on February 11, 1980, an Order was dated and entered by the Clerk of said Court reversing said conviction, because said prosecution had proceeded in absence of an Indictment.

14. That as a result of the Judgment of Conviction

and the commitment duly issued pursuant thereto, the plaintiff was incarcerated in a New York State Correctional Facility for a period of 32 months.

Decision, Findings of Fact and Conclusions of Law of District Court

CONCLUSIONS OF LAW

1. The threshold inquiry in an action brought pursuant to 42 US Code, Section 1983 is twofold. The Court must consider both whether the conduct complained of was committed by a person acting under color of state law, as well as whether that conduct deprived a person of rights, privileges, or immunities secured by the constitutional laws of the United States. PARRATT v. TAYLOR, 451 US 527, 535, (1981). As previously determined, the County of Montgomery is considered a person for purposes of Section 1983; however, with respect to the County, plaintiff additionally must allege and prove that the injury complained of was inflicted pursuant to execution of the County's official policy or custom.

2. In MONELL v. DEPARTMENT OF SOCIAL SERVICES, 436 US 658, 690-91, (1978), the Supreme Court held that a unit of local government, such as

deprivations visited pursuant to governmental 'custom' ", as well as deprivations visited pursuant to a "policy statement, ordinance, regulation or decision officially adopted and promulgated by the body's officers."

3. The Second Circuit recently has reiterated the MONELL criteria in BATISTA v. RODRIGUEZ 702 F2d 393, 397 (2d Circuit 1983) as follows: "Absent a showing of a causal link between an official policy or custom and the plaintiff's injury, MONELL prohibits a finding of liability against the City...Thus, to hold a city liable under Section 1983 for the unconstitutional actions of its employees, a plaintiff is required to plead and prove three elements: (1) An official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right."

4. Here, there is absolutely no proof of any custom or policy attributable to the County of

Montgomery whereby a defendant acquitted of one felony should be retried on a lesser included, but unindicted felony offense, when the jury was unable to agree on the lesser offense at the original trial. In the absence of a showing of such an official policy or custom, the plaintiff's claim must fall.

5. The Court recognizes that a persistent pattern or practice by municipal officials may amount to the custom or usage described in the MONELL case. No evidence of a persistent pattern or practice was adduced here. The Court also recognizes that Section 1983 liability may be imposed "where responsible municipal officials, aware of a pattern of unconstitutional action on the part of the municipality's officer or officers, authorize or encourage further misconduct by failing to act." TURPIN v. MAILET, 619 F2d 196, 203 (2d Cir. 1980). I find no such authorization or encouragement on the part of the County of Montgomery here.

Decision, Findings of Fact and Conclusions of Law of District Court

Finally, the Court recognizes that unusually brutal or egregious conduct, such as a severe beating, may result in the imposition of Section 1983 liability on a municipality, where such conduct may be considered attributable to a lack of adequate training or supervision on the part of municipal officials. OWENS v. HAAS, 601 F2d 1242 (2d Cir. 1979). No such conduct has been demonstrated here.

6. Moreover, it is the opinion of the Court that this action is barred by the statute of limitations. Any deprivation of a constitutional right of the plaintiff would have accrued at the time of his second trial for Arson in the Fourth Degree in 1977. This action was filed on January 12, 1983 and the three-year statute of limitations constitutes a bar to the action. PAUK v. THE BOARD OF TRUSTEES, 654 F2d 856, 861 (2d Cir. 1981) cert. denied 455 US 1000 (1982).

7. In any event, the Court finds and concludes

that plaintiff suffered no constitutional deprivation, since the double jeopardy clause contained in the 5th Amendment to the United States Constitution did not bar the state from subjecting the defendant to a second trial on the lesser charge of Arson fourth degree after the original jury was unable to agree on a verdict as to that offense. U.S. V. GOODAY, 714 F2d, 80, (9th Cir. 1983). PEOPLE v. FUDGER, 73 A.D. 1020 (3rd Dept. 1980).

I also find and conclude that there was no deprivation of any federal constitutional due process right of the plaintiff.

8. As to any state claim that may have been pleaded, I find and conclude that since the federal civil rights claims were so insubstantial and patently meritless, that the Court was without jurisdiction of any state claims that were asserted. DUNTON v. COUNTY OF SUFFOLK, 729 F2d 903, 910-11 (2d Cir. 1984).

Decision, Findings of Fact and Conclusions of Law of District Court

Accordingly, the Clerk is directed to enter judgment in favor of the defendant, dismissing the claims of the plaintiff in this case.

* * * * * *